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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CHEMICAL LEAMAN TANK LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi, Jackson Division

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JURISDICTIONAL STATEMENT

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Dated at
Washington, D.C.
November 24, 1969

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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On Appeal from the United States District Court for the Southern District of Mississippi, Jackson Division

---

JURISDICTIONAL STATEMENT

Appellants, Chemical Leaman Tank Lines, Inc., and Robertson Tank Lines, Inc., appeal from a Judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, which affirmed the orders of Interstate Commerce Commission, served February 9, 1969, August 1, 1966, and December 2, 1966,

in Docket No. MC-98749 (Sub-No. 1) (Explosive Deviation), Civil Action 4175 and April 7, 1967, June 25, 1967, in Docket No. MC-98749 (Sub-No. 22), Civil Action No. 4176. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

At this time appellants would point out to the Court that there were two separate complaints filed before the three-judge District Court because the two cases were filed under two different sections of the Interstate Commerce Act, but, because the parties were the same, the three-judge Court consolidated the two cases for purposes of briefing, argument, and decision. For purposes of clarity it will be necessary for appellants to separate the two cases in preparing this Jurisdictional Statement especially as to the issues involved.

OPINION BELOW

The opinion of the three-judge District Court for the Southern District of Mississippi, Jackson Division, 301 F. Supp. 258, (advance sheets) is reproduced here as Appendix A. The judgments of the District Court are set forth as Appendix B.

The reports and orders of the Interstate Commerce Commission in Docket No. MC-98749 (Sub-No. 1), (Explosive Deviation), Civil Action No. 4175, served February 9, 1966, August 1, 1966 and December 2, 1966, respectively are reproduced herein as Appendices C, D and E respectively.

The reports and orders of the Examiner and of the Interstate Commerce Commission in Docket No. MC-98749 (Sub-No. 22), *Durward L. Bell, Extension—Longview, Tex. Gateway*, Civil Action No. 4176, served November 2, 1966, April 7, 1967 and June 25, 1967 respectively are reproduced herein as Appendices F, G and H respectively.

JURISDICTION

These actions, previously referred to as Civil Action Nos. 4175 and 4176 were brought by appellants pursuant to provisions of 28 U.S.C. sections 1336, 1398, 2284, 2321-2325 to enjoin set aside and annul orders of the Interstate Commerce Commission in Docket No. MC-98749 (Sub-No. 1) (Explosive Deviation), Civil Action No. 4175, sometimes hereinafter called the Deviation Proceeding and in Docket No. MC-98749 (Sub-No. 22), *Durward L. Bell Extension—Longview, Tex. Gateway*, Civil Action No. 4176 hereinafter sometimes called the Sub 22 Proceeding. The judgments of the District Court, affirming the aforesaid orders of the Interstate Commerce Commission, were filed June 23, 1969. Notice of appeal was filed by Appellants herein in the United States District Court for the Southern District of Mississippi, Jackson Division, on August 21, 1969. This Court has jurisdiction under 28 U.S.C. 1253 and 2101(b) to review the judgment of the District Court on direct appeal. *I.C.C.* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744 (1963); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

Because, as we stated, the two proceedings were filed before the Commission under two different sections of the Interstate Commerce Act, it is necessary to differentiate the two. The principle statutory and regulatory provisions under consideration in Docket No. MC-98749 (Sub-No. 1) (Explosive Deviation) are: 49 U.S.C. 308 (b) and 49 C.F.R. 211.1(c)(11) while the principal statutory provisions under consideration in MC-98749 (Sub-No. 22), *Durward L. Bell Extension—Longview, Tex. Gateway* are; 49 U.S.C. 307 and 49 U.S.C. 316(c). All of these provisions are set forth in Appendix I hereto, as well as the applicable portions of the Administrative Procedure Act, 5 U.S.C. Section 1009(c).

QUESTIONS PRESENTED

The questions presented by this appeal arise from the opinion and judgment of the District Court which affirmed, in a Per Curiam opinion, the orders of the Interstate Commerce Commission in Docket No. MC-98749 (Sub-No. 1) (Explosive Deviation), served February 9, 1966, August 1, 1966, and December 2, 1966, respectively and in Docket No. MC-98749 (Sub-No. 22), *Durward L. Bell, Extension—Longview, Tex., gateway,* served April 7, 1967 and June 25, 1967 respectively, docketed by the Lower Court as Civil Actions No. 4175 and 4176 respectively. Since, as we stated, the two cases were brought before the Commission under two different sections of the Interstate Commerce Act, the questions presented in the two are entirely different and thus they need to be considered separately herein.

I. QUESTIONS PERTINENT TO CIVIL ACTION NO. 4175

A. Whether the District Court erred in affirming the Commission's determination that the explosive deviation application fell within the purview of the Deviation Rules, 49 C.F.R. 211.1(c)(11)(ii) set forth in Appendix I attached hereto?

B. Whether the District Court has erred in finding that the Commission has appropriately applied the Deviation Rules in the Explosive Deviation Proceeding under Review?

C. Whether the District Court has erred in failing to require that the Commission make a proper investigation by oral hearing or otherwise to determine if the criteria of 49 C.F.R. 211.1(c)(11)(ii) had been met?

D. Whether the District Court has erred in failing to require that the Commission establish a Rule, Guide, or Standard for interpreting the deviation granted?

E. Whether the District Court erred in affirming the Commission's decision despite a contrary decision by a three-judge court in *Greyhound Corporation* v. *United States et al.*, 221 F. Supp. 440 (1963) (D.C. Ill.)?

F. Whether the District Court erred in finding that there was substantial evidence before the Commission to support its ultimate findings and conclusions in this case?

G. Whether the District Court erred in finding that there exists a rational basis for the Commission's determination in this case?

II. QUESTIONS PERTINENT TO CIVIL ACTION NO. 4176

A. Whether the District Court erred in finding that substantial evidence was before the Commission and a rational basis exists for its determination in this case, when to do so, it cast aside without discussion or apparent consideration, the following questions raised in the lower court and presented for consideration here:

1. Whether the District Court erred in failing to find that the Commission had arbitrarily ignored or exceeded its statutory jurisdiction in granting the Sub 22 application and in failing to find that the Commission did not have legal justification for said grant of authority?

2. Whether the District Court erred in failing to find that the Commission had erred in considering the unlawful operations of appellee Bell, and in fact using said unlawful operations as a basis upon which to award its grant of authority?

3. Whether the District Court erred in failing to find that the Commission had erroneously granted competitive authority without an affirmative showing of public convenience and necessity, as required by Section 207 of the Interstate Commerce Act (49 U.S.C. 307)?

4. Whether the District Court erred in affirming the Commission's grant of authority to interline traffic when there was no proof introduced that any motor carriers would in fact participate in such arrangements.

B. Whether the District Court erred in finding that the Sub 22 application was not an application for *new* authority when there was no testimony by public witnesses to show that there was any need for service, and that such service would in fact be used.

C. Whether the District Court erred in finding that the Sub 22 application was solely an application for relocation of an interchange point when in fact the Sub 22 application also involved the substitution and elimination of a gateway which requires proof different than that necessary to obtain authority to allocate an interchange point.

STATEMENT OF THE CASE

Appellants, Chemical Leaman Tank Lines, Inc., and Roberson Tank Lines, Inc., are certificated common carriers authorized by the Interstate Commerce Commission to conduct operations between various points in the United States including the transportation of chemicals and petroleum products in bulk from points in Texas and Louisiana to various points in the United States.

I. PROCEEDINGS BEFORE THE COMMISSION

Since as we have stated the two proceedings were brought under different sections of the Act, and have different factual situations, it will be necessary again to separate the two proceedings in presenting them to this Court.

A. Civil Action No. 4175 Bell Deviation Proceeding

On November 26, 1965, Bell filed a letter notice, as amended and corrected, notifying the Commission that pursuant to Section (c)(11), the "explosives provision" of the Commission's Deviation Rules Revised, 1957 (49 C.F.R. 211.1) it intended to commence, on November 28, 1965, the "joinder of operating rights" with other carriers at its terminal in Longview, Texas, located approximately one mile from the plant site of Texas Eastman Company,* the alleged authorized point of interchange between Bell and other carriers. The provision of the Deviation Rules under which this application (notice) was filed is attached hereto as Appendix "I".

Protests were filed by your appellants and in addition by other motor and railroad common carriers. Certain of your appellants and other carriers requested that an oral hearing be held.

In the protest filed by The Mason and Dixon Tank Lines, Inc., and the supplemental protest (reply) of appellant Chemical Leaman (then Ryder Tank Line Division of Ryder Truck Lines, Inc.), there was attached a letter from Texas Eastman Company dated December 3, 1965, denying its consent to Bell to use the plant site of Texas Eastman for purposes of interchanging traffic with other carriers, or joining operating rights.

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* The record shows that Bell maintained that it had consent of the Texas Eastman Company to utilize its plant site for the interchange of traffic and for the joinder of its authorities.

Despite this withdrawal of consent, the Commission, by Operating Rights Review Board No. 1 issued its order, served February 7, 1966, denying the requests for oral hearing and granting Bell authority to operate under the proposed notice but only insofar as the operations would involve commodities which are explosive or of such an inherently dangerous nature as to present a potential hazard to the safety of the general public; and in all other respects denying the relief requested. Said order is attached as Appendix "C" herein. In said order, however, the Commission did not specify what commodities were within the category covered by the Deviation, and which were excluded. There was no citation to any governing regulation as to what commodities could be interchanged under the deviation granted.

Petitions for reconsideration were filed by your appellants as well as by other carriers. Bell replied to these petitions. Under date of July 19, 1966, your appellants and Mason and Dixon filed a petition to reopen, and to supplement the aforesaid petitions for reconsideration. By order served August 1, 1966, and during the pendency of the petition to reopen and to supplement the original petitions for reconsideration the Commission, by Division 1, issued an order denying the petitions for reconsideration. Said order is attached as Appendix "D".

Since the aforesaid petition to reopen and to supplement the petitions for reconsideration was still pending, and had not been acted upon, the Commission issued a corrected Order, served December 2, 1966 to include the aforesaid petition to reopen and to supplement, and denied said petition. A copy of said order is attached hereto as Appendix "E". It should be noted that the petition to reopen and to supplement had been received eleven (11) days prior to the order served August 1, 1966, and

in sufficient time to be considered in any subsequent orders.

Appellant Robertson, by date of December 17, 1966, filed a petition for a determination by the entire Commission that an issue of general transportation importance was involved. By letter dated December 21, 1966, the Commission, by Mr. Sheldon Silverman, Deputy Director, Operating Rights, rejected the petition, holding that the order served December 2, 1966 was administratively final.

B. Civil Action No. 4176 Bell Sub 22 Proceeding

On February 17, 1966, *during the pendency of the above Deviation Proceeding*, Bell filed an application under Section 207 [49 U.S.C. § 307] of the Interstate Commerce Act seeking a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes (1) (a) of chemicals, as defined in *The Maxwell Co., Extension—Addyston*, 63 M.C.C. 677, in bulk in tank vehicles from Longview, Texas to Texas Gulf Ports and points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio and Tennessee restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; (b) of liquid chemicals in bulk, in tank vehicles, from Longview, Texas to Texas Gulf Ports to points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, Tennessee, California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington and Wisconsin, restricted to movements of traffic originating at the Texas Eastman Company, and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; and (c) of gasoline in bulk, in tank vehicles, from Mount Pleasant, Tex., to Arkadelphia,

Magnolia and Texarkana, Ark., (2) of synthetic plastics, in bulk (not in liquid form), in specialized motor vehicle equipment from Longview, Tex., to points in California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington and Wisconsin, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; (3) of chemicals, in bulk, (a) from Longview, Tex., to points in Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; and (b) from Kingsport, Tenn., to Longview, Tex., restricted to movements of traffic destined to the Texas Eastman Company and traffic to be interlined with other carriers in joint-line service or tacked with other authority in direct single-line service; and (4) of chemicals, in bulk, in tank or hopper type vehicles, from Longview, Tex., to points in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and the District of Columbia, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service.

After several protests were filed by your appellants and several other carriers, the application was referred to Hearing Examiner Leo A. Riegel of the Commission for hearing and the recommendation of an appropriate order thereon. Hearing was held before said Examiner on July 6, 7, and 8, 1966 at Houston, Texas. The appli-

cation was opposed by your appellants and in addition the Mason and Dixon Tank Lines: Wheeling Pipe Line, Inc., and Western-Commercial Transport.

At the hearing, the only witness presented by appellee, Bell, was its owner and chief operating officer, Mr. Durward L. Bell. There was no testimony offered by any member of the shipping public, or any motor carrier to testify they would interline with Bell. In support of its application Bell presented several exhibits showing purported shipments supposedly handled in interline service from various points in Texas and Lake Charles, La. Exhibit No. 5, showing purported interline shipments by Bell was rejected by the Examiner. Your appellants as well as Mason and Dixon, offered testimony in support of their opposition.

At the conclusion of the hearing briefs were requested and were filed by Bell, your appellants and other protestants. By report and order served November 2, 1966, Examiner Reigel recommended that the application be granted substantially as filed, and in addition failed to include the self-imposed restrictions placed in the application by Bell. Said recommended report and order of Examiner Reigel is attached hereto as Appendix "F".

Exceptions to the recommended report and order were filed by your appellants, as well as by Mason and Dixon and Wheeling. Appellee, Bell, replied to said exceptions. By order served April 7, 1967, the Commission, by Operating Rights Review Board No. 1, affirmed the report of the Examiner, but did insert the self imposed restrictions which appeared in the application as originally filed, albeit in different language. A copy of this order is attached hereto as Appendix "G".

Petitions for reconsideration were filed by your appellants and Mason and Dixon to seek reversal of the aforesaid order of the Commission, Operating Rights Review Board No. 1. Bell, appellee, replied to these petitions. By

order served July 25, 1967, the Commission, by Division 1, acting as an Appellate Division, affirmed the order of Operating Rights Review Board No. 1, except to correct an administrative error in the Review Board report. A copy of said order denying the petitions and granting the application is attached hereto as Appendix "H".

Petitions seeking a determination by the entire Commission that an issue of general transportation importance was involved were filed by appellant Robertson, and by Mason and Dixon. Since these petitions did not stay the effectiveness of the decision of Division 1, the complaint was filed before the District Court before action on the above-mentioned petitions. However, by order served August 28, 1967, the Commission denied the aforesaid petitions.

II. PROCEEDINGS BEFORE THE DISTRICT COURT

The three protestants before the Commission in each of the two proceedings filed two complaints before the United States District Court, Southern District of Mississippi, Jackson Division, to set aside the Commission's orders in the two cases on the grounds that they were based upon unlawful, arbitrary, and capricious interpretations of the applicable statutes and were lacking in a stated rational basis. The applicant in these two proceedings, Durward L. Bell, intervened as a defendant.

Because the two complaints involved the same parties, the District Court consolidated the two suits for purposes of briefing, argument, and decision.

The opinion of the three-judge District Court, affirming the orders of the Commission was filed June 19, 1969 and the judgment of the three-judge District Court was entered June 23, 1969. Notice of appeal was filed by these appellants with the District Court on August 21, 1969. By order of this Court, dated October 1, 1969, the

due date for docketing the appeal was extended until November 24, 1969.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As we have previously stated because of the difference in the two cases, we deem it best to discuss the substantial questions which are presented in the two cases so that the Court may more clearly be apprised of the errors which appellants claim have been committed.

I

CIVIL ACTION NO. 4175
BELL EXPLOSIVE DEVIATION PROCEEDING

A. The Commission's Application of the Explosive Deviation Rule

The threshold question before this Court, in the Deviation proceeding, is the application by the Commission, affirmed by the District Court, of the Explosive Deviation Rules.

Section 49 C.F.R. 211.1(c)(11)(ii) states that common carriers of explosives and other dangerous articles may in the interest of safety interchange equipment or combine routes or other operating rights at any place within ten (10) miles of any point where interchange or joinder is permissible under the existing authorities of the carriers involved.

In the instant proceeding, because of the nature of the authority of Bell, such interchange or combination of authorities would have to take place at the plant site of Texas Eastman Company at Longview, Texas. However, because the decisions of the Commission preclude the use by a common carrier of the plant site of the shipper for purposes of combining authorities or interlining or interchanging of traffic *without the express permission of the*

shipper, there is no inherent right resting in Bell, the appellee herein, to interchange or interline traffic, or combine authorities without such express permission of Texas Eastman. See *Floyd & Beasley Transfer Company, Inc., Extension—Plant Site at or near Scottsboro, Ala.*, —— M.C.C. ——, Docket No. MC-18008 (Sub-No. 43) (not printed in full) served June 7, 1967; *Wheeling Pipe Line, Inc., Extension—Ethylene Dibromide*, 82 M.C.C. 229; *M. I. O'Boyle & Son, Inc., Interpretation of Certificates*, 52 M.C.C. 228 and *T.I.M.E. Incorporated, Extension—White Sands, N. Mex.*, 79 M.C.C. 463.

It was thus incumbent upon Bell to prove and the Commission to find; that Bell had the express permission of Texas Eastman to conduct operations through that company's plant site in order to perform any interline or interchange operation or to combine any authorities. From this fact, it can thus be seen that the right of Bell, the appellee, to interchange or interline traffic or to combine authorities was not a permanent one but was a right *conditional* upon the express consent of Texas Eastman.

Such tentative or conditional joinders are not those as are contemplated by the Deviation Rules, because at any time the right to join authorities or interchange shipments could terminate strictly by the withdrawal of the consent of the shipper. The Deviation Rules, by their very nature, contemplate a permanent ability to interchange or combine authorities, not a tentative one. If this is not true, then, the Deviation Rules would transform a tentative or contingent operation into a permanent one, clearly in violation of Section 207 of the Interstate Commerce Act (49 U.S.C. 307).

The record in this case fails to reveal that the appellee, Bell, did have the express permission of Texas Eastman to combine authorities or to interchange or interline traffic. In fact the record showed the contrary, namely, that the appellee, Bell, did not have such permission. The evi-

dence introduced by your appellants proved conclusively that Bell, the appellee, did not have such permission, and, despite this fact, the Commission allowed Bell to continue this deviation.

For this reason, we contend that the Interstate Commerce Commission arbitrarily, capriciously, and unlawfully found that the Deviation Rules applied and thus erred in granting the Deviation application and that the Lower Court erred in finding that a rational basis exists for this decision.

B. The Commission, Even If The Deviation Rules were Applicable, Has As A Matter of Law Erred In Applying These Rules

We contend that the Deviation Rules are not applicable to a contingent or conditional operation such as that involved in the Deviation proceeding here involved. In any event, we contend that, even if the Commission correctly found that the Deviation Rules were applicable, the Commission has erroneously applied those Rules in the instant proceeding.

The appeal to the District Court in this case is the only Deviation proceeding to be appealed to a three-judge Court other than the case of *Greyhound Corporation* v. *United States, et al.*, 221 F. Supp. 440 (D.C. Ill.) (1963), wherein the Lower Court reversed the Commission's deviation order on grounds which the Court in this proceeding has completely ignored.

1. ***The Commission Has As A Matter of Law Erred in Approving The Deviation Without an Appropriate Investigation, Either By Oral Hearing or Otherwise, To Determine If The Criteria of 49 C.F.R. Section 211.1(c)(11)(ii) Had Been Met.***

Realizing that the appellee Bell *must* have the express permission of Texas Eastman to use their plant site, the Commission made no investigation to determine if Bell

did have such permission. This is an essential determination, which must be made in order to award a deviation. Likewise no investigation was made, or the record fails to reveal that any investigation had been made, to ascertain if the deviation was in the interest of safety. A conclusion was made without any preliminary findings of fact, or investigation to determine if such conclusion in fact is supported.

It was because of the lack of evidence on these two issues that your appellants requested an oral hearing which was denied summarily by the Commission.

It was this identical action which caused the Court in the *Greyhound case, supra*, to remark:

> "If the Commission *after appropriate investigation*, determines the facts with respect to these criteria as contemplated by the regulation, there is no reason for redetermination of all the numerous elements required in the original certification. The procedure for receiving evidence and ascertaining the facts, whether by hearing affidavits or otherwise, is a matter of the sound administrative discretion of the Commission *so long as some reasonable procedure is adopted*, *Riss & Co.*, v. *United States*, 117 F. Supp. 296 (W.D. Mo. 1952), aff'd. mem. 346 U.S. 890 (1953).
>
> In the instant case, however, the Commission received no evidence and made no finding with respect to any of these criteria. There is accordingly no possible basis for ascertaining whether or not the order authorizing Carolina to use the alternate route is supported by the facts establishing that the reasonable standards prescribed by regulations have been met. We recognize that in reviewing a Commission order we may not substitute our evaluation of the evidence for that of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934). But so far as the rec-

ord before us reveals, the Commission made no specific determination that any of the criteria which it established had been met. *It merely found generally that the requirements of the Deviation Rules had been satisfied. Neither the parties nor a reviewing Court can determine whether such an order has a rational basis in fact.*

Both common sense and fair play require that the ground upon which an administrative agency acts be clearly disclosed and adequately sustained. *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83 (1957); *SEC* v. *Cheney Corp.* 318 U.S. 80 (1943); *Clarke* v. *United States*, 101 F. Supp. 587 (D.D.C. 1951)." (Emphasis ours.)

We contend that the problem which faced the Court in the above case exists in this proceeding. There has been no investigation by the Commission, either by oral hearing or other method, to determine if the criteria of the Deviation Rules have been met.

We contend that the Court in *Greyhound* properly considered the criteria which must be met, while the District Court here failed to give any rational basis in its order why the Commission should not be required to meet the same requirements. Thus, we have two Courts reaching different interpretations as to the same law and regulations.

2. *The Commission As A Matter of Law Erred In Failing To Establish A Rule, Guide, or Standard For the Deviation Granted.*

A primary prerequisite to the legal sufficiency of any order is that a rule, guide, or standard, by which said order is to be interpreted, must be established so that the public and all parties are sufficiently and clearly apprised of what the order grants or denies.

The Deviation Rule under which the deviation was granted to appellee, Bell, contemplates that the carrier involved is a "common carrier of explosives and other

dangerous articles." Bell, the appellee, does not hold authority to transport explosives and other dangerous articles as such but is a common carrier of bulk liquid and dry chemicals. While admittedly there are some chemicals which may be considered as "explosives or other dangerous articles," not all chemicals can be so classified.

In the orders of the Commission, concerning which this appeal is brought, there has been no investigation to determine what chemicals can be considered explosives or dangerous articles within the meaning of the Deviation Rules. Thus the order granting the deviation fails to establish any rule, guide, or standard to enable the public, the shippers, the appellee, Bell, its interline carriers, or any competiting carrier to ascertain what commodities may or may not be transported under the deviation granted.

Explosives and other dangerous articles do have meaning (See 49 C.F.R. 425) but there is no indication that Bell is restricted to transporting those explosives and dangerous articles as are defined in 49 C.F.R. 725. The order of the Commission fails to reveal exactly what is allowed to be transported under the order granting the deviation. As a result of this failure, Bell's attorney, the record will reveal, has advised the appellee that in the absence of any rule, guide, or standard, Bell can transport any chemicals, via the authorized deviation point.

This failure of the Commission to investigate and establish a proper rule, guide, or standard to govern the deviation granted is arbitrary, capricious, and unreasonable and the District Court erred in affirming this action.

3. *The Orders Herein Complained of Are Tantamount To The Granting to Appellee Bell a Certificate of Public Convenience and Necessity, not Contemplated By The Deviation Rules In Violation of Section 207 of the Interstate Commerce Act. (49 U.S.C. 307).*

The Deviation Rules do not contemplate the issuance of certificates but were promulgated pursuant to Section 208(b) (49 U.S.C. Rule 308(b)) of the Interstate Commerce Act to allow *occasional* deviations from the routes or between the terminal a carrier may be authorizer to serve. Here, however, a certificate has been issued, because appellee Bell does not participate in *occasional* deviations. They are frequent and permanent.

It is obvious from the record, including the statements of appellee, that it intends to operate *consistently* over the deviation route. There is to be nothing occasional about the operation because Bell cannot operate over its existing authority which is through the plant site, which it does not hold permission to use. Thus, the appellee has abandoned its existing authority and has operated and will operate only over the deviation route which is clearly contrary to the Act.

As was stated in the *Greyhound* case, supra:

> We agree with plaintiff that the authority conferred upon the Commission by Section 208(b) of the Motor Carrier Act to permit a carrier *occasionally* to deviate from a certificated route or terminal hardly can be construed to authorize a regulation governing the designation of a regular alternate route, which *may* as it has in the instant case, *become the carrier's principal route* between the cities in question. (Emphasis ours).

The Commission, in the instant case, has completely ignored the requirements of the Interstate Commerce Act and the decision of the Court in the *Greyhound* case supra, and the District Court of Mississippi has affirmed

Thus, we contend that the Commission erred in granting the Deviation application and that the District Court erred in finding that there was a rational basis for the Commission's decision in this proceeding. While appellees may argue that the Deviation proceeding is moot, this is not exactly correct. Your appellants must have relief in both cases, and while it is true that, if this Court should affirm the lower court's affirmation of the Sub 22 proceeding, Civil Action No. 4176, the Deviation Proceeding would be moot, this does not mean that the orders of the Commission in the Deviation Proceeding must not meet the standards of judicial review. Likewise, your appellants have suffered serious consequences as a result of this Deviation, which could be continued if this Court affirms the Deviation decision but reverses the Sub 22 decision.

II

CIVIL ACTION NO. 4176
BELL SUB 22 EXTENSION PROCEEDING

A. The Commission Has Arbitrarily Exceeded Its Statutory Authority In Granting the Sub 22 Application of Appellee Bell.

As will be seen from the statement of proceedings before the Commission, the Sub 22 application was filed during the pendency of the Explosive Deviation application. The District Court completely misstated the facts when it stated that the Sub 22 proceeding was something similar to an extension of the Deviation proceeding. The two are completely and totally separate and were filed under different sections of the Interstate Commerce Act. We believe it was the misunderstanding of the total distinctness of the two proceedings which led to the what we contend is the Court's erroneous affirmation of the Commission's unlawful actions in these two cases.

The Sub 22 proceeding was an application filed under Section 207 of the Act. Inasmuch as it was so filed, the decision and order granting such application must be

judged by the criteria established under that section, regardless of the theory under which the application is tried. In this proceeding, the Commission has exceeded its statutory authority in granting the authority sought, because the Commission has not complied with the criteria established under Section 207.

At the hearing Bell presented no testimony of supporting shippers, and presented no testimony of any motor carrier to show that such carrier would interline with it at Longview, Texas. The Courts have stated that the burden is upon the applicant in a proceeding to obtain a certificate of public convenience and necessity to prove that the proposed service is required by the present or future public convenience and necessity. See *Vincent Montone Transportation, Inc.*, v. *United States*, 231 F. Supp. 484. The courts have sustained denials of applications where there has been no shipper testimony that any service is required. *McLean Trucking Co.* v. *United States*, 63 F. Supp, 829. The Commission stated as follows in *Best Way of Indiana, Inc., Extension—Containers*, 86 M.C.C. 61, 75:

> ". . . We have no power to issue new operating rights except in accordance with the standards of Section 207 of the Act. These standards are basically designed to protect established carriers against the institution of new competing services unless the established carriers are unable or unwilling to respond to a distinct public need for the services proposed."

The Commission cited herein with approval its decision in *Pan American Bus Lines Operation*, 1 M.C.C. 190, wherein the classic test for proving public convenience and necessity under Section 207 were stated as follows:

> "The question in substance *is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need;* whether this purpose can and will be served as well by exist-

> ing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (Emphasis ours).

Without the testimony of supporting shippers Bell could not and did not prove that the proposed service would serve a useful public service, responsive to a public demand or need, since there was no one representing the public to prove it.

Bell, the appellee, relied entirely upon its past operations conducted supposedly through the Texas Eastman plant. However, as was found by the Commission, the operations were unlawful. In order to rely upon these operations as evidence of public convenience and necessity the Commission is required to make a finding that such operations were performed in good faith and were not willfully unlawful. In *Zuzich Truck Lines, Inc.*, v. *U.S.*, 224 F. Supp. 457, (1963), (D.C. Kans.), the Court held as follows:

> ". . . In order for evidence of past operations to be entitled to admission, and consideration in *determining whether there is a present or future need for such operations, they must have been lawful or, at least, conducted under some color of right.* See e. g. *McBride's Express, Inc.*, v. *U.S.*, 173 F. Supp. 539 (1958) (E.D. Ill.); *Carl Subler Trucking, Inc., Extension—Citrus Juices*, 78 M.C.C. 707, 713. (Emphasis ours).

In *Samuel Tischler, Extension—Canned Goods*, 82 M.C.C. 179, 182, the Commission stated:

> ". . . Moreover, we cannot conclude that there is a public need for the proposed service, where such need is predicated on unauthorized operations."

In the *Tischler case*, supra, the Commission was faced with a situation in which the applicant, as here, had violated the leasing rules and regulations of the Com-

mission expressed in *Lease and Interchange of Vehicles By Motor Carriers*, 51 M.C.C. 461, 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 63, 79 M.C.C. 251, and 84 M.C.C. 247. This principle has been sustained in several decisions, e. g. *John C. Barrett Common Carrier Application*, 79 M.C.C. 753; *Paul J. Miller Contract Carrier Application*, 79 M.C.C. 331; *King Van Lines, Inc., Investigation and Revocation of Certificate*, 84 M.C.C. 269; *Floyd & Beasley Transfer Co., Inc., Extension*, 79 M.C.C. 269, 274; *Peerless Stages, Inc., Investigation of Operations*, 86 M.C.C. 109, 119; *Argo-Collier Truck Lines Corp., Extension*, 83 M.C.C. 63, 72; 83 M.C.C. 433, 436-437; and *O'Neill Transfer Co., Inc., Investigation of Operations*, 83 M.C.C. 753, 761.

Thus, in finding that the past operations of Bell proved a need for the proposed services, the Commission was required to make a finding that such operations were conducted in good faith and were not willful violations. There has been no such finding made by the Commission in this proceeding.

Thus there is no evidence which may properly be considered as sufficient to meet the necessary criteria under Section 207 of the Act, and in granting the Sub 22 application, the Commission has exceeded its statutory authority and the District Court has erred in finding a rational basis for the orders of the Commission in said proceeding.

B. The Commission Has Arbitrarily and Erroneously Applied The Criteria Established Under Section 207 of the Act to the Sub 22 Application.

Your appellants contend that the Commission has exceeded its statutory authority in granting the Sub 22 application, but in any event, there is no doubt but that the Commission has improperly applied the criteria established under Section 207 to the instant application.

In rendering its decision, the Commission relied upon the decisions in *Hughes Transp. Inc., Extension—Interchange Point*, 64 M.C.C. 46, reversed at 67 M.C.C. 235 and *Blue Ridge Transfer, Inc., Extension—Roanoke, Va.*, 92 M.C.C. 463. However, neither of these cases support the decision rendered by the Commission. In the *Hughes* case, supra, the *interline carrier did appear* in support of the application, while, in the Bell Sub 22 proceeding, *no interline* carrier appeared in support of the application. This is extremely important since motor carriers are not obligated to interline and this record fails to reveal any evidence that any interline carrier will interline with the appellee, Bell.

Section 216(c) (49 U.S.C. 316(c)) states that "common carriers of property by motor vehicle *may* establish reasonable through routes . . ." (Emphasis ours.) It can thus be seen that there is no obligation on a motor carrier of property to enter into interline service. It is merely permissive. See *Union Pacific Motor Freight Co.*, 74 M.C.C. 279, 283; *Southeast Shippers Assn. Inc. v. Atlanta C. A. Motor Lines, Inc.*, 63 M.C.C. 491, 492; *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104; *Southeast Shippers Assn. Inc. v. Akers*, 54 M.C.C. 770; *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 52 M.C.C. 31, 34, 36; and *Strickland v. Detroit & C. Nav. Co.*, 253 I.C.C. 535, 537.

Because motor carriers of property are not obligated to interline there can be no assumption here that in fact they will interline with Bell. The Commission has held that unless the connecting carrier appears at the hearing to testify concerning its ability and willingness to participate in such movements, the evidence of the possibility of interline operations is entitled to little weight. See *Keoblic Refrigerated Xpress, Inc., Extension—North Dakota*, 89 M.C.C. 657; *Maxwell Co., Extension—Addyston*, 63 M.C.C. 677; and *Pumpowitz Extension—New Ulm, Minn.*, 64 M.C.C. 801 (not printed in full). It is there-

fore the burden of the party advancing the existence of the interline service to present the so-called connecting carrier to testify as to the availability of such service.

Although continually called to the Commission's attention by your appellants, there is not one iota of reference in any order of the Commission that these carriers would be willing to interline with Bell or serve the undefined shippers for whose use this service was supposedly made available. There has been no finding made that the service will actually be used, or that such service is required by the present or future public convenience and necessity. Actually if the Commission had considered the matter at all, it would have found that the two carriers who had supposedly interlined with Bell had filed their own applications to eliminate the necessity of interlining with Bell.

Especially is this factor so important when it is realized that the undefined interline carrier will actually be the carrier who originates the shipment and then tender it to Bell for delivery. There has been no finding made that any motor carrier will be amenable to serving any shipper in interline service with Bell.

Absent the testimony of any supporting shippers, or of any motor carriers willing to interline with Bell to serve these shippers, there can be and there is not any finding that the service will in fact be used. Certainly if Section 207 requires anything it requires a finding that the service authorized will be used. *Hudson Transit Lines v. United States*, 225 F. Supp. 804 (1964) (D.C. Colo.), affirmed 378 U.S. 128, 84 S. Ct. 1658, 12 L. Ed. 2d. 741.

Thus the Commission's reliance upon the *Hughes* case, supra, is completely erroneous in that there was no interlining carrier who presented any testimony in this record, nor was there any member of the supporting shipper who presented any testimony that they would use the services of appellee, Bell.

Likewise, the *Blue Ridge* case, supra, is not applicable herein because the *Blue Ridge* case did not involve the relocation of an interchange point which was a plant site, as in the Sub 22 application. The Blue Ridge interchange was not dependent upon the express permission of a plant site owner and thus it was not a conditional or contingent interchange as we have in the Bell Sub 22 application.

When Bell was granted its authority, the Commission saw fit to restrict Bell to service moving for Texas Eastmen, and thus, when Bell set up its interline arrangements, it did so at its own risk, knowing full well that at anytime the arrangement could be terminated merely by the withdrawal of the consent of Texas Eastman. Thus, while the authority of Bell was not restricted against interline or interchange of traffic or joinder of authorities, any such operations instituted were wholly conditional upon the express permission of Texas Eastman and appellee Bell fully realized this.

For these reasons the reliance by the Commission upon *Hughes* and *Blue Ridge* is entirely misplaced.

1. The Commission Erred In Failing To Find That The Sub 22 Proceeding Involved Both An Elimination of A Gateway and The Relocation of a Gateway and That the Tests Governing Each Are Different.

Completely overlooked by the Commission and the Court is the fact that the instant proceeding involves both the relocation of an interchange point and the elimination of a gateway. In fact the opinion of the Court specifically stated that the Bell Sub 22 proceeding involved *solely* the relocation of a gateway. This is completely erroneous.

The record will show that on shipments originating at Arkansas, Oklahoma and Kansas, Bell could join the au-

thority herein with its other existing authority and thus perform a through service to virtually all points in the United States over Longview, Texas. When the Commission granted Bell authority in Sub 22 to join such rights at a point other than the plant site of Texas Eastman, it allowed Bell to substitute a new gateway. This involved the elimination of a gateway, which requires proof different than that necessary to obtain authority to relocate an interchange point. *A Commission decision such as the one under consideration herein will leave the law on gateway eliminations in complete confusion.*

The term elimination and substitution of gateway and the criteria for such substitution and elimination of gateway were discussed in *Bowman Transportation, Inc., Extension—Substitution of Gateways*, 100 M.C.C. 314 (1965) affirmed *Bowman Transportation, Inc., v. U.S.*, 267 F. Supp. 57 (1967) (4 C. Ala.), wherein the Commission stated as follows:

> "A gateway results from a motor carrier connecting two grants of irregular-route authority at a joint common to each—the gateway point—and conducting operations through from points authorized in one grant of authority to points authorized in the other."

In discussing the criteria which must be met in order to substitute and eliminate a gateway the Commission stated as follows at 100 M.C.C. 326-327:

> When two separate grants of authority are joined at a gateway by a common carrier, a service results for which no public need has been demonstrated. The usual inefficiencies resulting from this type of operation are of the carrier's own choosing, and the mere fact of such operation is no assurance of need for such service or of economy and efficiency of operation. As a result, only when the elimination of whatever specific inefficiencies which may be in-

volved is found not to present a substantial hazard to existing carriers, will we consider granting more direct authority. This was well stated in *Martin Van Lines, Inc., Extension—12 States*, 79 M.C.C. 767, at 771, by division 1:

> It must be noted that these gateways which applicant must observe are not a result of any grant of authority to applicant by this Commission, but are the result of applicant's voluntarily combining or tacking of several individual operating authorities which were granted by us to other carriers and purchased by applicant. There is no requirement of this Commission that applicant join separate operating rights and render service to the public from points in one authority to points authorized under another operating right. It is not our action that contemplates operation in a circuitous manner, but is a matter of operation undertaken by applicant on its own volition. To authorize applicant to conduct the proposed operations which it cannot now perform efficiently and effectively in competition with existing carriers, without any showing of need therefor, would be directly contrary to the mandate of the act.

The instant application involves not the complete elimination of the five points gateway, but the authorization of a larger gateway area or, as recommended by the examiner, the authorization of Atlanta as an alternate gateway in addition to retention of three of the five points as gateways. In principle the examiner's recommendation involves the identical situation presented by a complete elimination of a gateway except that the comparison of applicant's present gateway operation must be made with its shortened operation instead of with the direct route. Here this may be somewhat academic as to traffic moving between many pairs of points since in many cases the direct route between such points is through Atlanta, and where this is not the case,

many carriers often operate by choice through Atlanta, a major traffic and interchange point, which thereby allows them to interchange traffic with other carriers and otherwise to operate to their best advantage.

The criteria for elimination of a gateway were set forth firmly by division 5 in *Childress—Elimination Sanford Gateway*, 61 M.C.C. 121, at 128, as follows:

> (1) whether applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and
>
> (2) whether the elimination of the gateway requirement would enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers. In the former instance, a grant of the authority sought is justified solely upon proof that the proposed operation would result in operating economies, which although primarily a benefit to the applicant, indirectly benefit the public through the medium of more efficient and economical service. In the latter instance, however, where the elimination of the gateway requirement would allow a new service, or would provide applicant with a substantial competitive advantage, not previously enjoyed, it is incumbent upon applicant to prove public convenience and necessity the same as in any other application for new authority.

The same conclusion is warranted here. Bell is seeking to substitute another gateway for the one authorized as to traffic originating in Arkansas, Oklahoma and Kansas and it has not presented any evidence to warrant such elimination.

The Commission has not made any findings to justify the substitution of a new gateway. Likewise, they have not made any findings to support their treatment of the substitution of the gateway as if it too were a relocation of an interchange point. In fact the reports and orders of the Commission are completely silent on this issue. The opinion of the Court is likewise silent on this issue.

For these reasons we contend that the Commission has erred in applying the tests of a relocation of an interchange point to the Sub 22 proceeding since it is not a case involving only the relocation of an interchange point but also involves the substitution and elimination of a gateway, and the criteria, which must be established in the two types of cases, are completely different.

2. ***The Commission Erred in Failing To Conclude Whether The Past Operations Relied on By Appellee Were In Fact Operations Conducted By Bell.***

The Commission, in order to apply evidence of past operations as proof of a need for service must find, first, that the operations were those of an applicant (Bell) and, secondly, that they were conducted legally and in good faith.

The record in this case will reveal that the past operations relied on by appellee Bell and the Commission were not those of Bell but rather the operations of the interlining carrier. The Commission found in this case that the appellee Bell had violated the leasing regulations and the regulations pertaining to the lease and interchange of equipment. The Commission then found that these violations did not prove appellee unfit. However, fitness is not the sole issue. The issue, which neither the Commission nor the Court considered, was whether the violations of the leasing regulations rendered the operations those of the interline carrier and

not those of Bell. In this connection, we would cite the decision in *Stewart, Investigation of Control*, 87 M.C.C. 681, wherein the Commission found that where there were violations of the leasing regulations by the lessee (in this case, by Bell, the appellee), the operations are actually those of the lessor (in this case the interline carrier).

Consequently because of these violations, we contend that the Commission erred in relying upon such past operations, especially when they failed to find whether in fact the operations were those of Bell. In *Hughes* and *Blue Ridge*, supra, the Commission found the operations to be those of Hughes and Blue Ridge. In this case, neither the Commission nor the Court considered the issue.

3. *The Commission Erred In Finding That The Granting of The Sub 22 Proceeding Would Not Result In A New Operation and Service.*

The Commission and the Court have specifically found that the granting of this application will not result in a *new* operation. This is clearly contradictory to the evidence and the law.

The evidence and the law shows that the operations authorized under the existing authority of Bell were not permanent but conditional or contingent, because the express consent of Texas Eastman was needed in order for appellee Bell to conduct such operations either through interchange or by joinder. Thus, the granting of this application by the Commission has resulted in a new competitive service in that it has changed a *conditional* operation to a *permanent* operation. No better showing of a new operation could be made.

The Commission has erred in finding that the transportation of a previously conditional operation, rendered not by Bell, but by its interline carrier, into a permanent operation, without proof of shipper need and proof

that another motor carrier will be willing to interline, would not result in a new and completely different operation.

Based on the record and the applicable law your appellants contend that the Commission has exceeded its statutory authority in granting the Sub 22 application and has failed to properly apply the criteria established by law under Section 207 of the Act.

CONCLUSION

For the reasons heretofore stated, appellants believe that the questions submitted by this appeal as to both cases are substantial and are of such far-reaching public importance as to require plenary consideration by this Court, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action Number 4175

HEARIN-MILLER TRANSPORTERS, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

Civil Action Number 4176

HEARIN-MILLER TRANSPORTERS, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

Honorable James P. Coleman, United States Circuit Judge, Honorable William Harold Cox, United States District Judge and Honorable Dan M. Russell, Jr., United States District Judge, Presiding.

PER CURIAM:

Plaintiffs seek a review by this three-judge court under 28 U.S.C.A. § 2284 of the orders of the Interstate Commerce Commission as provided by 28 U.S.C.A. § 1336, § 1398 and § 2321-2325, both inclusive, regulating the hauling of freight by motor carrier. These allied proceedings were consolidated by the Court for trial and briefing for convenience of the parties and the Court. The plaintiffs seek injunctive relief from the orders of the Interstate Commerce Commission granting certain

hauling rights and authority to the Bell Transport Company (hereinafter referred to as Bell).

Bell first obtained an order from the Commission to exchange its explosives and dangerous chemical cargo at the plant site of the Texas Eastman Company (hereinafter referred to as Eastman) in Longview, Texas. That permissive right was ultimately curtailed by Eastman, thereby precipitating the second proceeding before the Commission designated as Sub-No. 22 for the relocation of said interchange point to its own terminal in Longview, Texas, approximately 4,515 feet from the plant site of Eastman. The plaintiffs level many attacks on and criticisms against the action of the Commission both in the initial deviation proceeding and in the interline proceeding (Sub-No. 22) which resulted in the carrier (Bell) exchanging only shipments of Eastman products at the Eastman plant site and all other shipments at the carrier's relocated terminal site. The Eastman site was in use by Bell for approximately two years prior to its disruption by Eastman for a company policy reason.

The Sub-No. 22 proceeding which appears here as Civil Action No. 4176(J) was not an application by the carrier for a *new* franchise, necessitating a specific finding of convenience and necessity, but was only a proceeding for the relocation of such interchange point and nothing more. The parties admit that a disposition (favorable to the carriers) of Case No. 4176(J) here will moot Case No. 4175(J).

The Commission is vested with a wide discretion in the exercise of its expertise in this very technical field of transportation which involves so many varied facets of public interest and concern.[1] This record literally

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[1] *United States, et al* v. *Detroit & Cleveland Navigation Co., et al*, 326 U.S. 236, 66 S.Ct. 75 says: "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide

bristles with contentions and criticisms of the plaintiffs leveled at the validity of the Commission's orders in these cases. A cataloging of such contentions and a separate disposition of each of them here would not be fruitful but would unduly extend this discussion without corresponding benefit or advantage. It suffices to say that the Court is not persuaded of the tenability of any of such contentions.

This record shows that there was substantial evidence before the Commission to support its ultimate findings and conclusions in these cases; and that there exists a rational basis for its determination thereof in both cases. The action of the Commission in these cases in entering these orders was not arbitrary, capricious, or in violation of any rule of law, and did not impinge upon any vested right of any plaintiff here.

It is the opinion of this Court that these orders of the Commission in these cases are not vulnerable to any valid criticism thereof here, and that the complaints in these cases are without merit and will be dismissed at plaintiffs' cost in each case.

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range of discretionary authority. Interstate Commerce Commission v. Parker, 326 U.S. 60, 65 S.Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 42, 51 S.Ct. 337, 339, 75 L.Ed. 824; Alton R. Co. v. United States, 315 U.S. 15, 23, 62 S.Ct. 432, 437, 86 L.Ed. 586. Forecasts as to the future are necessary to the decision."

Operating Rights Board No. 2, dated February 2, 1966;

(4) Petition of The Mason and Dixon Tank Lines, Inc., protestant, filed March 9, 1966, as supplemented July 20, 1966, for reconsideration of the order of Operating Rights Board No. 2, dated February 2, 1966;

(5) Petition of Robertson Tank Lines, Inc., protestant, filed March 9, 1966, as supplemented July 20, 1966, for reconsideration of the order of Operating Rights Board No. 2, dated February 2, 1966;

(6) Reply to petition in (1) above by applicant filed March 4, 1966;

(7) Reply to supplemental petition in (1), (3), (4), and (5), above by applicant;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reasons (1) that the order of February 2, 1966, was properly entered after it appeared that the operations proposed therein meet the provision of the Commission's Deviation Rules Revised, 1957, (49 C.F.R. 211.1), including section 211.1(c)(11)(ii) thereof, and that such operations as noted in the order may lawfully be conducted, and (2) that no sufficient cause appears for reconsidering or vacating the said order.

It is further ordered, That this order shall become effective on the date hereof.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

[SEAL]

APPENDIX "F"

INTERSTATE COMMERCE COMMISSION

Served November 2, 1966

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-98749 (Sub-No. 22)

DURWARD L. BELL, EXTENSION—LONGVIEW, TEX., GATEWAY

Decided

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, as specified commodities from Longview, Tex., to points in numerous States, and from Kingsport, Tenn., to Longview, Tex., with certain conditions, and application in all other respects denied.

Joe T. Lanham and *Austin L. Hatchell* for applicant. *W. C. Mitchell, Thomas E. James, Clayte Binion, J. W. Durden, E. Stephen Heisley, Jerry E. Matthews* and *Archie H. Hutto* for protestants.

REPORT AND ORDER

RECOMMENDED BY L. A. RIEGEL, HEARING EXAMINER

By application filed February 17, 1966, Durward L. Bell, doing business as Bell Transport Company of Longview, Tex., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, (1) (a) of chemicals as defined in *The Maxwell Co., Extension—Addyston*, 63 M.C.C. 677, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports and points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, and Tennessee restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; (b) of liquid

chemicals, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports and to points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, Tennessee, California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington, and Wisconsin, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; and (c) of gasoline, in bulk, in tank vehicles, from Mount Pleasant, Tex., and Arkadelphia, Magnolia and Texarkana, Ark., and Bossier City, Mooringsport, Natchitoches, Oil City and Vivian, La.; (2) of synthetic plastics, in bulk (not in liquid form), in specialized motor vehicle equipment, from Longview, Tex., to points in California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington and Wisconsin, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; (3) of chemicals, in bulk, in tank vehicles, from Longview, Tex., to points in Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah and Wyoming, restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service; and (4) from Kingsport, Tenn., to Longview, Tex., restricted to movements of traffic destined to the Texas Eastman Company and traffic to be interlined with other carriers in joint-line service or tacked with other authority in direct single-line service; and (d) of chemicals, in bulk, in tank or hopper-type vehicles from Longview, Tex., to points in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and the District of Columbia.

restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct single-line service. Applicant notes that if the application is granted, the present certificates in No. MC-98749 (Sub-No. 1), and Sub-No. 8, Sub-No. 10, and Sub-No. 16 thereto will be surrendered for cancellation in order to eliminate duplicate operating authority.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on July 6, 7, and 8, 1966 at Houston, Tex. The application is opposed by The Mason & Dixon Tank Lines, Inc., (Mason and Dixon), Robertson Tank Lines, Inc., (Robertson), Ryder Tank Line Division of Ryder Truck Lines, Inc., (Ryder), Wheeling Pipe Line, Inc., (Wheeling), Hearin-Miller Transporters, Inc., (Hearin-Miller), Western-Commercial Transport, Inc., (Western-Commercial). Coastal Transport Co., Inc., upon being apprised of the issues withdrew its protest at the outset of the hearing. Briefs were filed by all parties except Western-Commercial.

APPLICANT'S EVIDENCE

Applicant holds certificates authorizing the transportation of chemicals and certain other commodities as described in Appendix I hereto. As noted, applicant is authorized to operate (1) from the plant site of the Texas Eastman Company near Longview to all points in the United States except Alaska, Hawaii and points in Arkansas, Oklahoma and Texas and those in Texas, (other than the Texas Gulf Ports) and (2) from Kingsport, Tenn., to the plant site of the Texas Eastman Company, near Longview. The headquarters and principal terminal is maintained at Longview and an additional terminal is located at Tyler, Tex. The Longview office is open 15 hours a day on the basis of six days a week, except Sundays and holidays, however, the carrier holds

out to render service 24 hours a day on a daily basis. The total number of employees is 35 inclusive of drivers. A safety program is maintained by applicant generally under the supervision of his insurance underwriter. Twenty-two tractors and 22 tank semitrailers are operated. Fourteen power units have sleeper cabs and a like number are equipped with power take-off pumps. A number of semitrailers are of special construction and designated to maintain certain required temperatures. A financial resume submitted by applicant as of March 30, 1966, shows total assets of $908;227, including current assets of $73,485. Current liabilities aggregate $189,551, long-term liabilities $361,781 and capital $356,-895. Net income before income tax allowance for the quarter ended March 31, 1966 was $37,591.

The sole purpose of the application is to permit applicant, if the sought authority is granted, to effect interchange of joint-line traffic as well as to permit the combining of various segments of existing authority held by applicant, at his Longview terminal in lieu of the plant site of the Texas Eastman Company, hereafter sometimes called Eastman. The distance from the terminal to the Eastman plant is 4,515 feet. Applicant's terminal and the Eastman plant lie within the Longview, Tex., Commercial Zone, as defined by the Commission, and under the sought authority applicant would be enabled to continue service to and from the Eastman plant. That portion of Sub-No. 1 authorizing the transportation of gasoline and the authority set forth in Sub-No. 18 are not affected by the instant application.

Since August 1963, applicant has participated in joint-line movements of traffic originating at sources in Texas and Louisiana on the lines of Groendyke Transport, Inc., and Younger Brothers, Inc., hereinafter called Groendyke and Younger, respectively, destined to points in territory served by applicant. Some traffic moves in the reverse direction from points served by applicant. In

other instances, applicant performs single-line service from the plant of Eastman near Longview to destinations in authorized territory direct or by joining several authorities at the plant site. Equipment of applicant and the connecting lines is utilized in joint-line operations.

OPPOSING CARRIERS' EVIDENCE

Hearin-Miller of Jackson, Miss., holds certificates authorizing the transportation, over irregular routes, of chemicals, petroleum and petroleum products, paint thinners and solvents, synthetic resins and other liquid products, in bulk, in tank vehicles, from specified origins and points in described areas in Texas and Louisiana to points in numerous States. Its home office and principal terminal are located at Jackson and a branch terminal is maintained at Baton Rouge, La. Twenty-one terminals or call stations are scattered throughout Alabama, Arkansas, Louisiana, Mississippi, Tennessee and Texas. Tractor equipment and tank semitrailers total 571 and 608, respectively. Additionally, it leases approximately 60 tank semitrailers and owns 34 miscellaneous semitrailers other than tank vehicles. Operations were profitable in 1964, but it experienced deficits in 1965 and the first five months of 1966, the latter in excess of $300,000.

Mason and Dixon, of Kingsport, Tenn., is a common carrier by motor vehicle, over irregular routes, as pertinent, of chemicals from numerous points in Texas to points in approximately 20 eastern and southern States. Such transportation may be performed, generally, by tacking operating authorities over the Kingsport gateway. The carrier operates 71 tandem-axle tractors with sleeper cabs and 102 tank semitrailers. On hauls of 350 miles or longer two drivers are assigned to a vehicle. Four tractors and seven semitrailers are regularly assigned at Texas City, Tex. Twenty-three terminals are maintained in 11 States. It renders service for Eastman and contends that 25 percent of its revenue is derived

from service performed for that shipper. It alleges loss of some traffic transported by applicant in single-line service or in joint operations by applicant and in connection with Groendyke and Younger.

Ryder, of Greensboro, N. C., is certificated to transport various commodities, in bulk, in tank vehicles, over irregular routes, from and to specified points in the United States, with exceptions. As pertinent, it is authorized to transport acids and chemicals described in its certificates from origins in Harris, Jefferson and Orange Counties, Tex., to points in the United States, except Alaska and Hawaii. It holds limited authority from points in Louisiana but is not interested in any traffic received through interchange with Younger originating in Louisiana. Terminals and sub-terminals are maintained at 25 points, generally in the southwest and south. A fleet consisting of 343 tractors and 424 tank semitrailers are owned and operated. The carrier describes in some detail the location and functions of a number of terminals at points in Texas, the specialized equipment operated and designed to meet specified shipper needs, the system of communications utilized between shipper and carrier, and its modus operandi, in general. Through these facilities it affords an efficient service to the shipping public.

In the period from January 1965 to May 1966, both inclusive, Ryder transported approximately 2,100 truckloads of acids and chemicals from Texas origins to numerous destinations. It opposes the application on the premises that applicant is not presently transporting traffic other than that in which Eastman or its subsidiaries have a vested interest, and other than traffic of an inherently dangerous nature which may be interchanged at the Longview terminal under the Deviation Order; that to authorize interchange of all traffic at the Longview terminal as sought, would divert a substantial portion of Ryder's tonnage and revenue, the latter estimated at approximately $20,000 a month; and that by

retention of the tonnage presently accruing to Ryder, some of which is tendered by shippers heretofore using the Groendyke-Bell interline service, Ryder can increase its fleet and terminal facilities thereby enabling it to improve the overall quality of service rendered the public. Operations in 1965 and the first five months of 1966 have been profitable.

Robertson, of Houston, Tex., is a motor common carrier specializing in the transportation of acids and chemicals, petroleum products and similar commodities, in bulk, principally in liquid form, from points in Texas to points throughout the United States, except Alaska and Hawaii. Equipment consists of 347 tractors and 394 tank semitrailers designed for transporting such products. Fourteen terminals and 17 call stations are maintained. From January through March 1966, both inclusive, it transported 491 truckloads of chemicals from origins in Harris and Brazoria County, Tex., to points in 33 States. During the period of these movements applicant was authorized to interchange all categories of shipments at the Eastman plant site. Operations in 1965 and the first five months of 1966 were profitable and gross income has increased over the previous comparable periods.

Westen-Commercial, of Fort Worth, Tex., by stipulation with applicant submitted certain operating data indicating that it conducts operations as a common carrier by motor vehicle of numerous commodities including, as pertinent, certain specified chemicals, in bulk, in tank vehicles, from Texas origins to points in a number of States. Nine terminals and 10 call stations are in operation in Texas, Oklahoma, Illinois and Tennessee. Two hundred fifty two tractors and 316 semitrailers of all types are utilized in its operation.

Wheeling Pipe Line, Inc., of El Dorado, Ark., by stipulation with applicant submitted evidence of its operating authorities, and pertinent data respecting terminal loca-

tions and equipment. It has limited authority for the transportation of chemicals from specified points in Louisiana to points in Arkansas, Louisiana, and Mississippi. Four terminals are maintained in Louisiana and Arkansas and 10 call stations are located in Arkansas, Louisiana and Texas. It operates 121 tractors and 170 semitrailers.

CONTENTIONS OF THE PARTIES ON BRIEF

Applicant, on brief, takes the position that shipper support is not requisite to a finding that public convenience and necessity require the granting of the sought relief to relocate the point of interchange, but that the issues concern the operating economies and efficiencies which will accrue to applicant by reason of the relocation of the interchange point, and whether the service rendered through the proposed interchange point will result in a service competitively different than that which can be performed through the present interchange point. Citing *Blue Ridge Transfer Co., Inc., Extension—Roanoke, Va.*, 92 M.C.C. 463.

Prior to approximately December 3, 1965, tacit approval was given applicant by Eastman to effect interchange or join operating authorities on its plant site. Eastman, through its division traffic manager by letter dated December 3, 1965, which allegedly was not received, withdrew such consent. Subsequently, by a communication dated January 12, 1966, Eastman deferred the earlier withdrawal of consent. Applicant was again advised by letter dated February 24, 1966, that previous arrangements to operate within the Eastman plant for the purpose of interchange or joining authority was being withdrawn effective April 1, 1966, and on June 2, 1966 such action was affirmed and clarified with the explanation that the earlier action did not apply to traffic in which Eastman Kodak Company, its divisions or subsidiaries, had a vested interest. The latter two commu-

nications are reproduced in Appendix II. The change of mind of the management of Eastman concerning consent to the use of its plant site by Bell and concurring carriers was due to action by Ryder in bringing to the attention of Eastman that Bell was utilizing its authority to the competitive disadvantage of Ryder. Applicant submits that protestants should not be heard to complain that a new and different competitive service would be instituted by the relocated interchange point that cannot be rendered at the present point of interchange by reason of their own overtures to Eastman. Applicant participates in joint rates by appropriate concurrences in tariffs published by Groendyke and Younger on traffic originating on their lines in Texas and Louisiana. On traffic originated by applicant at Kingsport, combination rates are applicable. Applicant is also a party to the Dangerous Articles Tariff, No. 11, MF-ICC No. 13 of American Trucking Associations, Inc., Agent, publishing regulations of the Interstate Commerce Commission for transportation of explosives and other dangerous articles by motor, rail and water carriers.

It is the contention of applicant that the position taken by Eastman has imposed a hardship on his operations resulting in uncertainty and inconsistency as to when the carrier could or could not accept connecting line traffic and continue to perform interchange at the Eastman plant. In order to continue participation in the movement of traffic tendered by connecting lines, applicant on November 26, 1965, filed with the Commission notice of proposed deviation in accordance with section 211.1(c)(11)(ii) of the Deviation Rules and Regulations Revised, 1957 (49 C.F.R. 211.1) to deviate all traffic from the point of interchange inside the entrance to the Eastman plant site with its concurring carriers required for joinder of operating rights to applicant's terminal at Ryder and Eastman Road near Longview two days after the date of such notice in the interest of safety of operations. By its order entered February 2, 1966, in No.

MC-98749 (Explosives Deviation), the Commission, Operating Rights Board No. 2, notified applicant that the operations proposed in notice, "only insofar as they involve commodities which are explosive or of such an inherently dangerous nature as to present a potential hazard to the safety of the general public, meet the provisions of the Deviation Rules, including section 211.1(c)(11)(ii) thereof; that such operations may lawfully be conducted so long as service is continued at the plant of the Texas Eastman Company near Longview, Tex.; and that the notice insofar as it comprehends operations involving commodities other than those described in this paragraph be, and it is hereby, rejected for the reason that such commodities are not embraced by said section of the Deviation Rules." Applicant concedes that the restriction contained in the considered grants of authority to serve the plant site of Eastman resulted from the sole support of that shipper.

The interchange of traffic on property of Eastman has been conducted since August 1963, with full knowledge, consent and approval of Eastman. A substantial tonnage was interchanged at the Eastman plant prior to April 1, 1966, and thereafter at the plant as well as under the Deviation Order at applicant's terminal. In January 1964, applicant received from the connections at the plant site 22 truckloads whereas 152 truckloads were received from connections at both points of interchange in January 1966. The total for the period for January 1964 through March 1966, both inclusive, aggregated in excess of 1,900 truckloads each averaging approximately 30,000 pounds. In 1965 and 1966, the number of shipments originated by applicant at Kingsport which were either interchanged or transported by applicant through combining separate authorities constituted 11 truckloads.

Applicant relies in part on the decision in *Hughes Transp., Inc. Extension—Interchange Point*, 67 M.C.C. 235 (1956) wherein the Commission, Division 1, in its

report on reconsideration, reversed the findings of former Division 5 in the prior report in 64 M.C.C. 46. Therein the Commission said:

> We do not agree with the conclusion in the prior report that shipper testimony is required in the circumstances here present to establish that public convenience and necessity require the proposed operation. As seen, applicant in obtaining authority to serve the depot received a concomitant right to interchange traffic with other motor carriers at that point. In the exercise of that right, and subsequently under temporary authority, it has developed a large movement of explosives and related commodities. The performance of this interchange service for such a long period of time and the development of such a large volume of traffic is a strong indication that there is a need for the continuance of the service. *While it may be within the police power of the State or a division thereof, or of the Department of Defense or a division thereof, to prohibit an interchange at certain points or within certain areas subject to their control, it is our responsibility to prevent the disruption of services upon which the public has relied for a long period of time.* The granting here of authority desired to accomplish that purpose will not enable applicant to institute a new or different operation that it has performed in the past, and therefore, would not have any adverse effect upon the operations of the opposing motor carriers. A grant of the authority hereinafter described in the findings, therefore, is justified on the grounds set forth above. (Emphasis supplied.)

Applicant also cites the decision in *M. I. O'Boyle & Son, Inc., Interpretation of Certificate*, 52 M.C.C. 248, which in essential respects involves the same question presented here. The principles involved in that case will be discussed later herein. Applicant points out that interchange during regular hours or on holidays and after

regular hours at its terminal in lieu of effecting such interchange on the Eastman property would result in average savings of $1.90 and $7.47, respectively, and an average savings of one hour in transit time on each vehicle. Applicant at present may interchange or combine operating authorities only on traffic at the Eastman plant in which the parent corporation or its subsidiaries have a vested interest, and he can similarly handle only dangerous chemicals through the Longview terminal under the deviation order. As a consequence applicant is compelled to decline participation in movement of other categories of commodities both as to joint-line and single-line traffic.

Summarizing, applicant requests findings that as a result of the service period performed since August 1963, the traffic thereunder has been substantial and has benefited many chemical shippers; that the service on the Eastman property has been with its approval or at applicant's terminal under the Commission's approval by the Deviation Order; that the proposed relocation of the point of joinder will not result in any competitively different service than that which can now be performed; that operating problems have been encountered by reason of Eastman's final action; that although the owner of private property may deny the use of such interchange of equipment or lading in joint-line service, the action of Eastman actually results in change of character of the service authorized in applicant's certificates, and the Commission is responsible for seeing that the service permitted by the private property owner and relied upon for a number of years by shippers is not impaired or disrupted; and that the application to relocate the point of joinder as proposed should be granted.

On brief, Ryder and other opposing carriers, except Western-Commercial, assert that denial of the application should be premissed on the following grounds:

(1) No competent evidence has been adduced. Shipments received in interchange from Groendyke as reflected in exhibits submitted in evidence were transported in Groendyke's equipment operated by its drivers from origin to destination, and such equipment interchange is not bona fide, and constitues nothing more or less than lease of operating rights without Commission approval. In citing applicant's failure to comply with regulations governing interchange of equipment[1] as promulgated in 49 CFR 207.1 through 207.5, it points to the following violations: (a) Consideration for use of interchange equipment is not specified, inasmuch as the division of revenue and consideration for use of equipment shown on the lease was incorrect and the true consideration computed later; (b) in some instances inspection certification was executed with a typewriter and not signed by the required parties; and (c) Groendyke and Bell did not comply with certification requirements as to competency of the person making the inspection. Bell operates as an individual, hence he is the proper party to certify that one of his employees or other person is competent to make the required inspection in accordance with 49 CFR 207.4(c). In no instance did he make such certification. As to inspection by Groendyke, a corporation, a terminal manager and not a corporation official certified as to his competence in making the inspection. See 49 CFR 207.5 (a) and 207.5(d). Further, the signature of the terminal manager varied from lease to lease. Even if operations conducted by Bell and Groendyke were found to be in substantial compliance with the leasing and interchange regulations, it is apparent that Bell does not exercise effective control over transportation performed from the Eastman plant at Longview to destination. The only performance in the transaction by Bell is to inspect the equipment (and this is done by a person not properly

[1] Lease and Interchange of Vehicles By Motor Carrier, 51 M.C.C. 461, 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251 and 84 M.C.C. 247.

certified) and place his placards on the tractor, for which he receives a certain percent of the line-haul transportation charges collected by Groendyke. Citing *Stewart-Investigation of Control*, 87 M.C.C. 681.

(2) Relocation of an interchange point is not applicable to the facts presented. The authority granted Bell was designed to meet the needs of Eastman and, accordingly, the authorities issued embraced the transportation of chemicals from or to Eastman's plant site near Longview. In 1963 applicant began to handle traffic by interchange with Groendyke and Younger and also by joining its own operating rights at the Eastman plant site with the knowledge and consent of shipper. The arrangement was only temporary and permissive, hence applicant is seeking relocation of his temporary interchange point into a permanent one without proof by competent public witnesses that the public convenience and necessity require such a conversion of service. Removal of the interchange point to Bell's terminal places the carrier in a competitive advantage which it does not now enjoy.

(3) Proof of present and future public convenience and necessity required to sustain the grant of authority sought has not been adduced. Applicant bases his case upon a theory of operating economy alone. Such premise is insufficient to sustain applicant's burden of proving public convenience where a new service would result. *Chesapeake M. Lines, Inc., Extension—Packinghouse Products*, 79 M.C.C. 175; and *Interstate Commerce Carrier Council* v. *United States*, 84 F. Supp. 414 (Md. 1949), affirmed per curiam 338 U. S. 843 (1949). The cost for interchange of vehicles during regular hours and on holidays at applicant's terminal as opposed to interchange at the Eastman plant site for a given number of vehicles in a given month is purely hypothetical and does not reflect actual savings. Substitution of an interchange point presupposes that the carrier has permanent authority to use the old interchange point to the same ex-

tent as it seeks to utilize the new point. Here, Bell's present authorization at the point of interchange is highly restricted whereas the grant herein would remove the restriction and create a new service.

DISCUSSION AND CONCLUSIONS

Prior to April 1, 1966, applicant participated jointly with Groendyke and Younger in the transportation of various categories of chemicals, in bulk, in tank vehicles, originating on these lines in Texas and Louisiana, respectively. Such traffic was interchanged at the plant site of Eastman at Longview by reason of restriction in applicant's authority. Similarly, applicant performed a single-line service by joining separate operating authorities at the Eastman plant site. On April 1, 1966, Eastman restricted interchange at its plant site solely to traffic in which it or its subsidiaries had a vested interest. The Deviation Order entered February 2, 1966, by the Commission, Operating Rights Review Board No. 2, authorized interchange at applicant's terminal at Longview only of "commodities which are explosive or of such an adherently dangerous nature as to present a potential hazard to the safety of the general public." This dilemma requires applicant to decline acceptance of other categories of chemical shipments from its connecting lines or from shipper's where he holds single-line authority resulting in a loss of considerable traffic and the consequent diminution of revenues.

In the *O'Boyle case*, supra, the Commission determined under what conditions separate authorities held by O'Boyle to and from Bolling Field, Washington, D. C., could be joined at that point. The carrier had the approval of the governing officials to make deliveries at Bolling Field, but was prohibited from entering the military reservation for the purpose of combining its separate operating authority on other traffic. The Commission found that the highways or streets leading to the

gate or adjoining the outer boundary of the reservation were not authorized points of service and that the two authorities could not be so combined by any theoretical interchange at any point on such highway or street. The conclusion was reached, however, that the separate authorities, which include the right to serve the field, could be combined subject to approval by the military authorities of physical operation through Bolling Field. There is no question concerning applicant's right to interchange with connecting lines or tacking operating authorities to perform single-line service at Eastman's plant site at Longview prior to April 1, 1966, inasmuch as it had approval of the Eastman management to do so. Opposing carriers stressed the point that such approval was merely permissive and temporary and since April 1, 1966, has been restricted solely to Eastman's traffic and, therefore, relocation of the point of interchange results in a new service requiring proof of public convenience and necessity through public witnesses. The examiner does not agree.

In order to justify a finding that public convenience and necessity require a grant of operating authority which would allow relocation of tacking or interline point an applicant need only establish the principals, first, that there would result operating economies and efficiencies which although they benefit the carrier, also contribute to more reliable, expeditious, and economical transportation and thus result in benefits which can be passed on to the shipping public, and second, that the proposed service to be performed through the new gateway point will not result in a service competitively different than that which is being performed through the present gateway. Citing the *Blue Ridge Case*, supra. Nor is the contention of protestants, each of whom conduct extensive operations and transport large quantities of commodities, in bulk, in tank vehicles, convincing that the proposed service would result in a showing of material adverse effect on their operations in general.

A number of irregularities and violations of the lease and interchange rules in joint operations of applicant and his two connecting lines, as noted by protestants, are shown to exist. Immediate action should be taken to remedy these irregularities and effect interchange of equipment in strict conformity with the Commission's rules and regularities relating thereto. The noted irregularities are not of such magnitude, however, as to require a finding that applicant is unfit to conduct operations through the relocated gateway. In the examiner's opinion, to so find would, in effect, be tantamount of the imposition of restrictions on present operating authority of applicant without due process. The examiner concludes that applicant has sustained the burden of proving a need for the proposed service and that a grant of authority sought will not result in a new and different service to the detriment of existing carriers. In order to avoid the granting of definite operating rights the authority granted will be conditioned upon applicant's written request for cancellation of authority presently set forth in certificate No. MC-98749 (Sub-No. 1), (except that portion authorizing the transportation of gasoline, in bulk, in tank vehicles, from Mt. Pleasant, Tex., to Arkadelphia, Magnolia and Texarkana, Ark., and Bossier City, Mooringsport, Natchitoches, Oil City, and Vivian, La.) and Sub-No. 8, Sub-No. 10, and Sub-No. 16.

FINDINGS

The examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, (1) of chemicals, as defined in *The Maxwell Co., Extension—Addyston*, 63 M.C.C. 677, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports and points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio and Tennessee; (2) of liquid chemicals, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports to points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, Tennessee, California,

Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington and Wisconsin; (3) of synthetic plastics, in bulk, (not in liquid form) in specialized motor vehicle equipment, from Longview, Tex., to points in California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington and Wisconsin; (4) of chemicals, in bulk, (a) from Longview, Tex., to points in Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah and Wyoming, and (b) from Kingsport, Tenn., to Longview, Tex.; and (5) of chemicals, in bulk, in tank or hopper-type vehicles, from Longview, Tex., to points in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and the District of Columbia, subject to the condition that applicant shall, in writing, request cancellation of authority in certificate No. MC-98749 (Sub-No. 1), (except that portion authorizing transportation of gasoline, in bulk, in tank vehicles, from Mt. Pleasant, Tex., to Arkadelphia, Magnolia, and Texarkana, Ark., and Bossier City, Mooringsport, Natchitoches, Oil City, and Vivian, La.), and Sub-No. 8, Sub-No. 10, and Sub-No. 16.

The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the rules and regulations thereunder; that an appropriate certificate should be issued; and that in all other respects the application should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By L. A. Riegel, Hearing Examiner.

(Signature) L. A. Riegel

APPENDIX I

Operating Authority of Durward L. Bell, Doing Business As Bell Transport Company.

No. MC-98749 (Sub-No. 1):

Chemicals, as defined in The Maxwell Co., Extension—Addyston, 63 M.C.C. 677, in bulk, in tank vehicles, over irregular routes,

From the site of the plant of Texas Eastman Company (near Longview, Tex.), to Texas Gulf Ports, and points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, and Tennessee.

Liquid Chemicals, in bulk, in tank vehicles,

From the plant site of the Texas Eastman Company near Longview, Tex., to Texas Gulf Ports, and to points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, Tennessee, California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington, and Wisconsin, with no transportation for compensation on return except as otherwise authorized.

Gasoline, in bulk, in tank vehicles,

From Mt. Pleasant, Tex., to Arkadelphia, Magnolia, and Texarkana, Ark., and Bossier City, Mooringsport, Natchitoches, Oil City, and Vivian, La., with no transportation for compensation on return except as otherwise authorized.

No. MC-98749 (Sub-No. 8):

Synthetic Plastics, in bulk (not in liquid form) in specialized motor vehicle equipment, over irregular routes,

From the site of the Texas Eastman Plant near Longview, Tex., to points in California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington, and Wisconsin, with no transportation for compensation on return except as otherwise authorized.

No. MC-98749 (Sub-No. 10):

Chemicals, in bulk, over irregular routes,

From the plant site of the Texas Eastman Company, near Longview, Tex., to points in Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, with no transportation for compensation on return except as otherwise authorized.

From Kingsport, Tenn., to the plant site of the Texas Eastman Company, near Longview, Tex., with no transportation for compensation on return except as otherwise authorized.

No. MC-98749 (Sub-No. 16):

Chemicals, in bulk, in tank or hopper-type vehicles, over irregular routes,

From the plant site of the Texas Eastman Company, near Longview, Tex., to points in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and the District of Columbia, with no transportation for compensation on return except as otherwise authorized.

No. MC-98749 (Sub-No. 18):

Chemicals, in bulk, in tank and hopper-type vehicles, over irregular routes,

Between Longview, Tex., on the one hand, and, on the other, points in Arkansas, Oklahoma, and Kansas, restricted against the transportation of (1) nitric acid and nitrogen solution from El Dorado, Ark., to Longview, Tex., (2) muriatic acid from Oklahoma City, Okla., to Longview, Tex., and (3) phosphoric acid or sulphuric acid from Tulsa, Okla., to Longview, Tex.

APPENDIX II

TEXAS EASTMAN COMPANY
Division of Eastman Kodak Company
Longview, Texas 75603

February 24, 1966

Bell Transport Company
P. O. Box 2362
Longview, Texas
Attention: Mr. Durward L. Bell

Gentlemen:

Please refer to our letters of December 3, 1965 and January 12, 1966, dealing with the use of our property for the purpose of interchanging equipment. The former letter withdrew our consent while our latter amending letter deferred the withdrawal of consent.

We believe it is best for us to disassociate ourselves from the growing differences which have become apparent between the carriers on this subject. We feel that the matters in dispute are for the regulatory bodies to arbitrate. As a shipper, it is our belief that in further continuing the granting of consent, we are in effect deciding matters which are properly in the province of the powers of those regulatory agencies.

In order to remove ourselves from this position and in the belief that continuation can serve no useful purpose toward a solution, we are hereby withdrawing our consent effective April 1, 1966.

Yours very truly,

TEXAS EASTMAN COMPANY

M. H. BRABHAM
Division Traffic Manager

TEXAS EASTMAN COMPANY
Division of Eastman Kodak Company
Longview, Texas 75603

June 2, 1966

Mr. Durward L. Bell
Bell Transport Company
P. O. Box 2362
Longview, Texas

Dear Durward:

There has been some question concerning the tendering of traffic by Eastman to Bell when the tacking of operating authority is involved. Mr. Lanham has suggested a letter of clarification for your files.

The withdrawal of consent as previously presented had to do with the interchange of equipment on our property. The withdrawal does not apply to traffic in which Eastman Kodak Company, its divisions or subsidiaries, have a vested interest.

Yours very truly,

TEXAS EASTMAN COMPANY

M. H. BRABHAM
Division Traffic Manager

Recommended by L. A. Riegel,
Hearing Examiner.

(Signature) L. A. Riegel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1966.

No. MC-98749 (Sub-No. 22)

DURWARD L. BELL, EXTENSION—
LONGVIEW, TEX., GATEWAY

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

It is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service of a notice to the parties that this order has be-

come effective as the order of the Commission, or within such additional time as may be authorized by the Commission, the grant of authority made in such report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary

[SEAL]

APPENDIX "G"

SERVICE DATE
APRIL 7, 1967

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Operating Rights Review Board Number 1, held at its office in Washington, D. C., on the 5th day of April, 1967.

No. MC-98749 (Sub-No. 22)

DURWARD L. BELL, EXTENSION—
LONGVIEW, TEX., GATEWAY
(Longview, Tex.)

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions thereto filed jointly by Wheeling Pipe Line, Inc., and Robertson Tank Lines, Inc., and separately by Mason and Dixon Tank Lines, Inc., Chemical Leaman Tank Lines, Inc., and Hearin-Miller Transporters, Inc.; protestants, and the reply to the exceptions filed by applicant; and

It appearing, That the foregoing pleadings, except as noted below, raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That the application, as filed, was restricted to movements of traffic originating at the Texas Eastman Company and traffic received through interchange of equipment in joint-line service or through tacking with other authority in direct, single-line service; that the examiner inadvertently omitted this restriction

in his recommended grant of authority; and the restriction, as worded to conform to Commission practice, is proper and should be imposed;

And it further appearing, That the examiner recommended the granting to applicant of a certificate of public convenience and necessity authorizing the operation, as modified herein, described in the appendix to this order;

Wherefore, and good cause appearing therefor:

We find, That the examiner's findings should be, and they are hereby modified by placing in the authority granted a restriction which limits service either (a) to the transportation of traffic originating at the plant site of the Texas Eastman Company near Longview, Tex., or (b) to the transportation of traffic which is interchanged at Longview, Tex., or which is moving in single-line service by tacking or combining the authority granted herein with applicant's existing authority;

We further find, That the evidence considered in the light of the pleadings does not warrant a result substantially different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner, as modified herein, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application, except to the extent granted herein, be, and it is hereby, denied.

It is further ordered, That upon compliance by applicant with two requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and with the Commission's rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate will be issued, subject to the coincidental cancellation at applicant's request of the certificates indicated in the appendix to this order.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Operating Rights Review Board Number 1, Members Gaffney, Carleton, and Van Voorhis.

H. NEIL GARSON,
Secretary

[SEAL]

APPENDIX

SERVICE AUTHORIZED:

Operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, (1) of chemicals, as defined in *The Maxwell Co., Extension—Addyston*, 63 M.C.C. 677, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports and points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, and Tennessee; (2) of liquid chemicals, in bulk, in tank vehicles, from Longview, Tex., to Texas Gulf Ports and to points in Illinois, Indiana, Kentucky, Louisiana, Missouri, Ohio, Tennessee, California, Coloroda, Michigan, Minnesota, Nebraska, Oregon, Washington, and Wisconsin; (3) of synthetic plastics, in bulk, (not in liquid form) in specialized motor vehicle equipment, from Longview, Tex., to points in California, Colorado, Michigan, Minnesota, Nebraska, Oregon, Washington, and Wisconsin; (4) of chemicals, in bulk, (a) from Longview, Tex., to points in Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming, and (b) from Kingsport, Tenn., to Longview, Tex.; and (5) of chemicals, in bulk, in tank or hopper-type vehicles, from Longview, Tex., to points in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and the District of Columbia; restricted in each instance to the transportation of traffic which either originates at the plant site of Texas Eastern Company near Longview, Tex., or, in the case of (3) (b), above, which is destined to the plant site of Texas Eastman Company near Longview, Tex.; or which is interchanged at Longview, Tex.; or which is moving in single-line service by tacking or combining the authority granted herein with applicant's existing authority, and

subject to the condition that applicant shall, in writing, request cancellation of authority in certificates Nos. MC-98749 (Sub-No. 1), (except that portion authorizing transportation of gasoline, in bulk, in tank vehicles, from Mt. Pleasant, Tex., to Arkadelphia, Magnolia, and Texarkana, Ark., and Bossier City, Mooringsport, Natchitoches, Oil City, and Vivian, La.), and Sub-No. 8, Sub-No. 10, and Sub-No. 16.

APPENDIX "H"

SERVICE DATE
JULY 25, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 17th day of July, A.D. 1967.

No. MC-98749 (Sub-No. 22)

DURWARD L. BELL, EXTENSION—
LONGVIEW, TEX., GATEWAY
(Longview, Tex.)

It appearing, That by Decision and Order dated April 5, 1967, Operating Rights Review Board Number 1 authorized applicant to conduct the operations described in the Appendix thereto, subject to certain restrictions; that in the 25th line of the said Appendix, which described the service authorized, reference was made to "the case of (3)(b), above,"; that there is no (3)(b) included in the described grant of authority; and that the proper reference should have been to "(4)(b)";

It further appearing, That petitions for reconsideration of the Decision and Order of Operating Rights Review Board Number 1 dated April 5, 1967, were filed by protestants Chemical Leaman Tank Lines, Inc., Ryder Division; Mason and Dixon Tank Lines, Inc.; Robertson Tank Lines, Inc.; and Hearin-Miller Transporters, Inc.; on May 19, 1967; May 22, 1967; May 22, 1967; and May 22, 1967; respectively;

It further appearing, That a reply to the petitions for reconsideration described in the immediately preceding paragraph was filed by applicant on June 12, 1967;

Upon consideration of the record in the above-entitled proceeding, the matters described in the preceding appearing paragraphs, including protestants' petitions for reconsideration and applicant's reply thereto; and good cause appearing therefor;

It is ordered, That the Appendix to the Decision and Order of Operating Rights Review Board Number 1 of April 5, 1967, be, and it is hereby modified by deleting from the 25th line thereof the phrase "in the case of (3) (b), above," and inserting in lieu thereof the phrase "in the case of (4) (b), above".

It is further ordered, That the said petitions for reconsideration be, and they are hereby, denied for the reason that the findings of Operating Rights Review Board Number 1 in its Decision and Order of April 5, 1967, notwithstanding the heretofore discussed modification, are in accordance with the evidence and the applicable law.

And it is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the Decision and Order entered herein on April 5, 1967, as modified herein, shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

[SEAL]

APPENDIX "I"

APPLICABLE STATUTES AND REGULATIONS

1. 49 C.F.R. 211.1(c) (11) pertaining to the Deviation Application which is the subject of the complaint in Civil Action No. 4175 reads as follows:

> (11) Deviations by motor carriers of explosives and other dangerous articles. Subject to the general conditions and requirements set forth in paragraph (d) of this section:
>
> (i) A regular-route motor carrier of explosives, or other dangerous articles in order to avoid streetcar tracks, tunnels, viaducts, dangerous crossings, or places where persons are assembled, may use any practicable route lying wholly within the United States provided that the distance over the route used between the point of deviation and the point of return is not less than 90 percent of the distance over the service route between the same points, or if it is less than 90 percent provided the deviation route used is at all points within 10 miles of the authorized place which is bypassed.
>
> (ii) Common carriers of explosives and other dangerous articles operating over either regular and irregular routes, or both, may in the interest of safety interchange shipments or equipment or combine routes or operating rights at any place within ten miles of any point where interchange or joinder is permissible under the existing authorities of the carrier or carriers involved.

2. 49 U.S.C. 307 reads as follows:

> (a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder; and

that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways. Feb. 4, 1887, c. 104, Pt. 11, § 207, as added Aug. 9, 1935, c. 498, 49 Stat. 551.

3. 49 U.S.C. 308(b), pertaining to Deviations, reads as follows:

A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

4. 49 U.S.C. 316(c), pertaining to the right but not the obligation of motor carriers of property to establish through routes and joint rates, reads as follows:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to estab-

lish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereto as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this chapter.

5. Administrative Procedure Act, 5 USC Section 1009 (c) provides:

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject

to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."